

STATE OF VERMONT
DEPARTMENT OF EDUCATION

Special Education
Case #DP05-18

Due Process Hearing

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

On June 28, 2005, the school district (hereafter the “district”) filed a special education due process hearing request. A conference call was held on July 11, 2005 with the district’s director of special services, the district’s attorney, the parent and the hearing officer participating. The hearing was scheduled for August 31, 2005. Several times during the call, the parent spoke abusively to the hearing officer and the district’s attorney. On July 21, 2005, the parent and the hearing officer spoke on the telephone. The parent stated that he did not want to wait until August 31st for the hearing. When the hearing officer called the parent on August 25th to tell him it would not be possible to reschedule the hearing, he began to yell obscenities and was verbally abusive at which point, the hearing officer ended the call. A short time later, his wife called tell me the hearing officer they wanted the hearing before August 31st. While she was talking on the telephone, the parent was in the same room shouting obscenities and being verbally abusive. On July 29, 2005, the hearing officer issued an Order which stated that due to the parent’s verbal abuse and inappropriate behavior, there would not be a hearing on August 31st. Instead the parties would submit written documents to the hearing officer on or before August 20th and any response was to be submitted no later than August 31st. The hearing officer’s decision was to be issued on or before September 15, 2005. The district submitted a written submission on August 19, 2005. The parent, to date, has submitted nothing.

ISSUE

Whether a separate therapeutic day program proposed by the district for the implementation of the student’s 2005-2006 IEP services is appropriate.

FINDINGS OF FACT

The student is a thirteen year old seventh grader attending the district's school. He is a child with an Emotional Disturbance and a Specific Learning Disability (D. Ex. 107B and 107E).

In 1995, when 4 years old, the student received Essential Early Education Program support services in speech and language pursuant to an Individual Education Plan (hereafter "IEP"). (District Exhibit (hereafter "D. EX." 108-113).

In April 1998 the student's IEP team determined that he was no longer eligible for special education although there was concern about his behavioral/emotional well being. (D. Ex. 331-335).

In September 1998, the student repeated first grade at another school district in Vermont. In December 1998, the student enrolled in the district's school again. In February 1999, an Act 157 Plan meeting was held due to academic and behavior concerns about the student. The student was enrolled in third grade at another school district in Vermont in December 1999. In 2000, the student moved to Maine. (D. Ex. 220).

In September 2004, the student returned to Vermont and entered the 7th grade mainstream program at the district's school. Records were sent from Maine to the district. The records indicated that, while in Maine, the student had been participating in a therapeutic day program.. (D. Ex. 77 & 81).

In mid-October 2004, the student was doing quite well in the district's regular education class. At an IEP meeting on October 14, 2004, the student was found likely to need speech and language services, access to the resource room and referral to a counselor. He was doing well in French and Science but Math was more difficult. His current behavior plan was found to be appropriate. (D. Ex. 77).

The Education Planning Team met October 18, 2004 and drafted an evaluation that would address the areas of emotional disturbance, specific learning disability and speech/language difficulties. The parent signed the evaluation plan on December 21, 2004 (D. Ex. 78, 80, 85).

On November 23, 2004, the student refused to follow directions when asked to leave the classroom. The student was given time and space to vent and redirect his anger and was dismissed for the rest of the day. The student returned with his step-mother on Monday, November 30, 2005 to meet with the principal and discuss a behavior plan for reintegration. During the meeting, the step-mother and the student argued and the step-mother left. The student tried to follow and when an attempt was made to restrain him, he became physically violent and verbally abusive. (D. EX. 53-55, 169-171).

An IEP review meeting was held on December 2, 2004. It was agreed that the student would remain out of school temporarily with tutoring and counseling being made available at home. (D. Ex. 81-82).

The school psychologist did an "Emergency Safety Evaluation" of the student during tutoring between December 2 and 21, 2005 and reached the conclusion that it would not be safe for the student to return to school. (. Ex. 171).

Another IEP review meeting was convened on December 21, 2004. The student's behavior plan was discussed and the parent agreed to the re-evaluation plan and signed a consent for the evaluation. (D. Ex. 83-85 and 138).

On January 3, 2005 an IEP meeting was held to discuss tutoring for the student and his recent behavior. Off-site tutoring was to begin at the town hall. The IEP was amended to reflect off-site and on-site tutoring. The evaluation plan went forward. (D. Ex. 86-87).

An Eligibility Meeting was held on March 14, 2005 to review the evaluation results and discuss the student's progress. The student's counselor stated that the student's birth mother upsets him. The school psychologist stated that the student's learning disabilities are compounded by his lack of focus. In addition, his language processing is not strong, he becomes frustrated when thinking in words, has a hard time sitting still and focusing and is hyper vigilant. His IQ is not representative due to attending difficulties. The student is unable to monitor his behavior and has an adverse reaction to educational setting. The student is overwhelmed and preoccupied with what is going on in his life. He is not ready to go back into the regular classroom. The team agreed that the student meets the criteria for emotional disability and a specific learning disability. (D. Ex. 93-94).

A March 24, 2005 meeting was cancelled because of threatening behaviors made by the parent several days earlier at school. Due to the safety issue, the meeting was rescheduled for March 31, 2005 with the parent attending by telephone. (D. Ex. 95).

During the March 31, 2005 IEP meeting, the parent stated that the student was angry because his mother was in town. The parent also said that he wanted the student back in school. A district team member said that the meeting should end because of the parent's inappropriate language. Plans were made to re-integrate the student into the classroom on a trial basis. If re-integration was not possible, it was agreed that the student would return to a tutoring room and a therapeutic day program would be investigated. It was decided that the student would be able to choose whether or not to attend Geography class in the regular classroom. The district's guidance counselor and special educator stated that the student did not want to see his classmates. The Assistant Superintendent said that the school was not able to meet the student's needs. The school psychologist stated that the school was not able to provide the therapeutic setting the student needed. (D. Ex. 96-100 and 155).

In April 2005, the student returned to the school for tutoring in the "Vermont Room". Attempts were made to reintegrate him into the regular classroom but they were not successful. The principal wrote to the parent on April 14, 2005 stating that she was concerned about the student's not attending the Geography class and she felt that this issue needed to be addressed. (D. Ex. 155).

On May 24, 2005, an IEP meeting was held to discuss the student's placement. Due to the parent's inappropriate behavior toward district personnel, he participated by telephone. The parent requested that the student be returned to school. The evaluation results and the behavior plan were reviewed. The parent again insisted that the student return to the school. The director of special services stated that the district members of the team felt that the school was not an appropriate placement for the student. The parent's vulgar language resulted in the termination of the meeting. (D. Ex. 101-106).

Because the May 24th meeting ended prematurely, district members of the team filed unanimous written statements in June 2005 setting forth their

belief that the school could not provide the services required for the student to be successful and that the least restrictive environment for him would be a therapeutic day program. The school psychologist further stated that it would not be safe for the student to return to school. (D. Ex. 3-10).

On June 6, 2005 while the student was being tutored off-site, he saw his birth mother across the street, became violent, refused to follow directions, threatened the staff and left the grounds without permission. Attempts to intervene and de-escalate his behavior were not successful. The student was sent home and suspended for two and a half days. (D. Ex. 52).

The student needs a therapeutic placement to progress educationally and keep himself and others safe. The program should include small group instruction for academics, a structured therapeutic setting with a behavioral support staff, parent training and support and home-school coordination. The student needs to acquire anger management, problem-solving and safety skills that are needed to maintain healthy relationships with peers and adults. These skills are essential for the student to be reintegrated into the regular classroom. The student's May 24, 2005 IEP addresses the student's needs and describes the placement necessary for implementation as a separate day facility. (D. Ex. 107A-N).

CONCLUSIONS OF LAW

A child eligible for special education must be provided with an IEP that is reasonably calculated to give him educational benefit. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 176 206-7 (1982). There is little question that the student's IEP will provide him with the services he needs to receive educational benefit but the parties are at odds about where the program is to be implemented.

The parent believes that the student should attend his local school and receive his special education services there. The district believes that based on the student's behavior while at school and his inability to return to the regular classroom, he requires a therapeutic program in an alternative setting if he is to progress educationally. To make the determination of whether to remove the student from the regular classroom several factors must be considered.

The Third Circuit Court of Appeals in *Oberti v. Bd. Of Ed.*, 995 F.2d 1204 (1993), adopted a two pronged test to be applied when deciding if a child should be removed from the regular classroom. The first prong includes the following considerations: (1) whether the school has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular classroom, with appropriate supplementary services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of other children in the class. *Oberti* at 1217-1218.

In this case, the student had to be removed from the school for safety reasons in November 2004. An emergency evaluation during December 2005 resulted in a determination by the school psychologist that it would not be safe for the student to return to school. The efforts to reintegrate the student in a single class in April 2005 were not successful. Because the student was not able to attend class, the issue of reasonable accommodations is not relevant here. When considering the benefits in the regular classroom versus an alternate setting, it is clear that, another environment is required given that the student is not able to be safe in the regular classroom. The third factor brings the safety issue to the fore. The school is well aware, as is the student, that he is unable to control his behavior. To have the student attend school before he has acquired the skills needed to control his behavior, jeopardizes the safety of other children as well as school personnel, on a daily basis. The answer to first prong of the *Oberti* test is clear. The student must be removed not only from the classroom but from the school.

The second prong of the *Oberti* test requires an investigation of the “continuum of alternative placements...” 34 C.F.R. §300.551(a). After the issue of safety resulted in the removal of the student from school on November 30, 2004, the school attempted to reintegrate him during April 2005. These attempts were not successful. As discussed above, in the school psychologist’s opinion, it would not be safe for the student to return to school until he had acquired the skills necessary to control his behavior. In a case such as this, a review of various types of services or a determination of how much time is to be spent in the classroom is not relevant. The necessary and appropriate alternative is a program that is separate from the school and provides a therapeutic setting. Thus, in this case, the district has met the two pronged test of *Oberti* and the student must be removed from the school if

he is to make educational progress.

ORDER

The student is to be placed at a therapeutic day program such as the SUCCESS program in Rutland, Vermont without delay.

Dated at Hartland, Vermont this 9th day of September, 2005.

Catherine C Stern
Hearing Officer

Parties have a right to appeal the hearing decision by filing a civil action pursuant to 20 U.S.C. §1415(i)(2)(a). Such appeal must be commenced within ninety (90) days of the notice of this decision